SUPREME COURT, U. S.

Supreme Court of the United States.

October Term, 1974.

No. 74-517.

ETTA B. BOSS,
Petitioner,

v.

JAMES W. BOSS, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS.

Brief in Opposition to Petition for a Writ of Certiorari.

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Supreme Court of the United States.

October Term, 1974.

No. 74-817.

ETTA B. ROSS,
Petitioner,
v.
JAMES W. ROSS, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS.

Brief in Opposition to Petition for a Writ of Certiorari.

Counterstatement of the Case.

In this case the petitioner seeks to present to the Court questions of an allegedly constitutional nature arising from a decision of the Massachusetts Appeals Court which adjudicated the rights of the petitioner and the respondent, her former husband, to various categories of property acquired by the parties during their marriage. It is the position of the respondent that certiorari should not be granted in this case because no substantial issues of a constitutional

dimension are presented. First, however, it is necessary to provide an alternative statement of the case insofar as the petitioner's statement of the case relates to the specific rulings of the Massachusetts Appeals Court.

The petitioner seeks to attack a presumption applied by the Appeals Court that when a married person pays for property placed in the spouse's name, a gift is presumed to have been intended, as opposed to the resulting trust that would be presumed had the parties not been married. The petition characterizes the Appeals Court opinion as adjudicating the rights to virtually all of the property involved by reference to that presumption (Petition at 5-7); a careful reading of the opinion itself (Petition at 1a-14a), however, shows that the gift presumption was used to adjudicate rights to a relatively minor portion of the property, consisting of 124 shares of bank stock (Petition at 7a-8a). As to the marital domicile, the court merely held that the petitioner did not prove that she had paid the entire purchase price (Petition at 9a); therefore the question of whether a resulting trust should be presumed did not arise.

Nor was a resulting trust question raised by the court in its treatment of the art works and household furnishings. The court held that the petitioner failed to prove that her contributions to a joint checking account used to purchase the property were not gifts for the benefit of both spouses (Petition at 10a-11a). The implicit presumption that they were gifts, however, did not arise from a "marital" exception to the resulting trust rule. Such contributions to a joint checking account are not *purchases* of property in the name of another, but are more like gratuitous conveyances of property, as to which no resulting trust presumption arises in any event. See Scott, *Trusts* (3d ed. 1967), § 405, pp. 3219-3220; Pomeroy, *Equity Juris-*

prudence (5th ed. 1941), § 1035. Thus, as to the joint checking account and the property purchased from it, the court was applying a presumption which would have been the same had the parties not been married, at least while both were still living. See *Astravas* v. *Petronis*, Mass. Adv. Sh. (1972) 521; 280 N.E. 2d 183.

Finally, there was no resulting trust question raised in the court's discussion of the Orion shares (Petition at 11a-13a). Rather, the court held that the petitioner failed to prove that she paid either the total or a specific part of the purchase price of shares placed in the respondent's name; in fact the court held that the money used to purchase most of the stock was nominal consideration only, and that the real consideration was the respondent's services which he provided to Orion as an employee. Thus, contrary to the petitioner's assertions (Petition at 5), there was no occasion for the court to apply the "marital exception" to the resulting trust rule in adjudicating rights to the Orion stock.

Argument.

I. The Presumption Applied to the Bank Stock by the Appeals Court and Attacked by the Petitioner is Not Based on Marital Status, but is Much Broader.

Generally when one purchases property with his own money and has title placed in another person's name, that other person is presumed to hold the property on a resulting trust for the person who paid for it. However, there are many circumstances in which a gift to the title holder will be presumed. One of those circumstances—marriage—was involved in the state court proceedings below. In seeking review of this case the petitioner seeks to portray the marital exception as the only exception to the resulting trust rule, thus bringing the exception be-

fore the court in the light of recent cases which have held invalid some classifications based on marital status.

A review of trust law makes it clear, however, that the exception to the resulting trust rule it much broader than the petitioner asserts. The same "gift" presumption has been held to apply where a father purchases property in the name of his son, daughter, son-in-law, illegitimate child or adopted child. See Scott, *Trusts* (3d ed. 1967), § 442, pp. 3333-3336. Thus, Scott characterizes the exception in this way: "The question is . . . whether the grantee is a natural object of bounty of the payor, whether he stands in such a relationship to the payor that it would be natural for the payor to make provisions for his advancement." Scott, *supra*, at 3340. Thus the exception to the resulting trust rule applied by the Appeals Court is not based merely on the marital relationship, but goes much deeper into the relationship between the parties to ascertain whether the payor might naturally have wanted to care for the grantee.

II. However Phrased, the Exception to the Resulting Trust Rule Applied by the Appeals Court to the Bank Stock and Attacked by the Petitioner Clearly does Not Raise Constitutional Questions.

Even assuming that the exception applied by the Appeals Court can be treated as one based only on the marital status of the parties, the court's opinion does not raise questions of a serious constitutional nature. A classification based on marital status used to adjudicate rights to property does not invoke a strict judicial scrutiny test (see *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 18-40 (1973)); in fact the petitioner concedes (Petition at 12) that a more traditional equal protection analysis applies. Thus the question is whether the "mari-

tal" exception to the resulting trust rule is reasonable. The answer is clearly in the affirmative.

As discussed, *supra*, the marital exception is based simply on the notion that a spouse is one for whom a person can be expected to care and provide. The petitioner attacks this rationale as outdated. Her argument (Petition at 10) that the "marital" exception arose at a time when women were considered chattel is clearly not on point, since in the present case itself the husband was the beneficiary of the exception. More to the point, the petitioner argues that divorce (and, presumably, increasing divorce statistics) destroys the rationale of the "marital" exception. Insofar as the petitioner argues that upon divorce the presumptions of intent applicable to marital purchases and conveyances should change, her argument flies in the face of the well-settled doctrine that gifts and resulting trusts are made, and intent is to be determined, with reference to the status and conduct of the parties at the time of the operative events, and *not* at the time when the parties seek judicial resolution of their differences. Insofar as the petitioner argues that the possibility of divorce makes the marital exception irrational, the Court should be hesitant to rule that married persons cannot be expected to care and provide for one another.

The petitioner cites many situations in which the "marital" presumption will be contrary to the intent of the parties.[1] The answer to this contention is simply that it is

[1] "The class against which the discriminatory presumption operates consists of married men and women who, for convenience, pay for property and place title in their spouse's name, or in both names." Petition at 10. "In modern times, a husband might place title in joint names or his wife's name solely to avoid delay in administration of his estate if he dies first. . . . Similarly, the economic discrimination against women has often necessitated that they use joint accounts and place property in joint names with their husbands, or have their husbands cosign mortgages." Petition at 13.

precisely because of such possibilities that the presumption is rebuttable. The petitioner's attempt to paint the presumption as irrebuttable is not convincing. According to Scott, "[e]ven though the grantee is so related to the payor as to be a natural object of his bounty, parol evidence is admissible to rebut the presumption of a gift and to show that a trust was intended." Scott, *Trusts* (3d ed. 1967), § 443, p. 3343. Case law bears out this observation. See, e.g., *Robinson* v. *Robinson*, Mass. Adv. Sh. (1974) 2444, 2449; N.E. 2d , , where the Massachusetts Supreme Judicial Court noted in a similar case that gift and resulting trust presumptions "embody or rest on common sense ideas for discerning intention, but they operate, when they operate at all, only in the absence of countervailing or rebutting factors, the goal in all cases being to reach a fair interpretation of the totality of the facts." Nor can it be argued that the gift presumption was given undue weight in the present case. In fact, the Appeals Court noted that the only evidence offered to rebut the presumption—the petitioner's concern for the tax consequences of the purchase of the bank stock—supported rather than rebutted the gift presumption (Petition at 8a). Thus the present case clearly does not present for the Court's review a presumption which is irrebutable.

Conclusion.

In the present case the opinion of the Massachusetts Appeals Court does not raise questions of a serious constitutional nature which should be reviewed by this Court. The Petitioner is in effect asking the Court to review and reverse the holding of the Appeals Court as to a minor portion of the total property involved. However, to do so on the constitutional grounds suggested, the Court would

have to change radically the common law of most states regarding marital gifts and resulting trusts. The law of resulting trusts and the exceptions thereto, marital and otherwise, present interesting questions of public policy which go to the core of the relationships between people and their dealings with one another. It may very well be that the presumptions are relied upon too heavily by courts,[2] or that as social conditions change their rationality will diminish. However, the present case does not present a factual basis for considering these questions in a constitutional setting. Furthermore, this Court should be hesitant to review state court decisions on a constitutional issue that was not raised in the state courts below.[3] For all of the above reasons the petition for writ of certiorari in this case should be denied.

Respectfully submitted,

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[2] Note that Scott does not, as the petitioner asserts (Petition at 10), sharply criticize the marital presumption itself, but only the undue weight given it by some courts. See Scott, *Trusts* (3d ed. 1967), § 442, p. 3036, quoted in Petition at 12-13.

[3] The petitioner's assertions that the questions raised here were raised below (Petition at 7-9) are incorrect. The Petition for Rehearing and Application for Leave to Obtain Further Review filed in the state courts (Petition at 22a-24a) argued that this Court's decision in *Kahn* v. *Shevin*, 416 U.S. 351 (1974), *required* a resulting trust presumption when a wife purchases property in the name of her husband despite a gift presumption when a husband purchases property in the name of his wife. This novel constitutional argument was far different from that raised here, that the marital gift presumption is irrational when applied to either the husband or the wife.